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IN THE

Supreme Court of the United States

October Term, 1955.
No. 314

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Petitioners,

vs.

UNITED STATES OF AMERICA and LEE ARENAS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JOHN W. PRESTON,
OLIVER O. CLARK,
DAVID D. SALLEE,
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712 Rowan Building,
Los Angeles 13, California,
Petitioners.

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JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Petitioners,

vs.

UNITED STATES OF AMERICA and LEE ARENAS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals, entered in the above-entitled case on May 21, 1956.

Opinions Below.

The District Court wrote no opinion. The opinion of the United States Court of Appeals, printed in Appendix A hereto, is reported in 232 F. 2d 77.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 23, 1956. [R. .....; p. ....., *infra.*] Rehearing was denied on May 21, 1956. [R. .....] The jurisdiction of this Court is invoked under 28 U. S. C. A., Sec. 1254(1).

Question Presented.

The principal question involved herein is whether the District Court, in the exercise of its equity jurisdiction under the Act of August 15, 1894 (28 Stat. 305, as amended; 25 U. S. C. A., Sec. 345), had power to allow interest on the judgment for attorneys' fees and expenses of suit as damages for delay in payment.

Statute Involved.

The statutory provisions involved are contained in 25 U. S. C. A., Sec. 345, as follows:

> "All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant) * * *"

Statement.

This petition for a writ of certiorari stems from and is part of the litigation entitled *Lee Arenas, Plaintiff, vs. United States of America, Defendant.* The action was brought in the District Court of the United States for the Southern District of California by Lee Arenas under 25 U. S. C. A., Sec. 345, *supra,* to secure an allotment of land in severalty from the reservation of the Agua Caliente (or Palm Springs) Band of Mission Indians situated in Riverside County, California. The petitioners were the attorneys for Lee Arenas from the inception of said case until judgment was entered in his favor (*Arenas v. United States,* 60 Fed. Supp. 411) and until after the judgment of the District Court was affirmed by the Circuit Court of Appeals (*United States v. Arenas,* 158 F. 2d 730), certiorari denied by this Court, 331 U. S. 842, on June 9, 1947.

Upon remand of the case to the District Court petitioners filed therein their petition for allowance of attorneys' fees and expenses of suit, and for an equitable lien on the allotted lands of Arenas. The District Court awarded fees on a percentage basis, the United States and Arenas appealed, and the Court of Appeals affirmed as to petitioners' right to fees and expenses of suit and to an equitable lien but reversed as to percentage fees, directing that the District Court determine the money value of petitioners' legal services. (*Arenas v. Preston,* 181 F. 2d 62.) The United States and Arenas filed petition for certiorari, which was denied by this Court on October 9, 1950. (340 U. S. 819.) On remand, the District Court awarded attorneys' fees to petitioners in the amount of $90,000 and expenses of suit in the amount of $258.67; the United States and

Arenas again appealed, and the Court of Appeals affirmed. (*United States v. Preston*, 202 F. 2d 740.) Upon remand, petitioners moved for an order of sale of a sufficient amount of the Arenas lands necessary to satisfy said judgment, and that interest at 7% per annum, from a date six months subsequent to the entry of the judgment, be added to the principal amount thereof. The order of sale so provided. The United States moved to delete the words "together with lawful interest thereon at the rate of 7% per annum from April 6, 1951." [R. 15.] The District Court, on October 26, 1953, modified its original order of sale to provide that, *inter alia*, the proceeds of sale be paid: "* * * (2) to the petitioners John W. Preston, Oliver O. Clark and David D. Sallee, the amount of Ninety Thousand Two Hundred Fifty-eight and 67/100 Dollars ($90,258.67), together with lawful interest thereon at the rate of seven per cent (7%) per annum from October 6, 1951 * * *". [R. 18, 19.] No appeal was taken from said order. Thereafter, by stipulation of all parties, Lee Arenas sold portions of his allotted lands and the net proceeds thereof aggregating $122,114.00 were deposited in the registry of the District Court and the lien of the judgment was transferred to said deposited funds by stipulation of the parties and by order of the court. Upon petition of John W. Preston [R. 46-53], order to show cause [R. 57-61], and findings of fact and conclusions of law [R. 61-72] the District Court, on August 21, 1954, ordered distribution of the amount of said judgment and the interest thereon from October 6, 1951,

to petitioners and/or their assignees. [R. 73-78.] The United States and Lee Arenas appealed from those portions of the judgment "awarding and allowing * * * interest from and after October 6, 1951." [R. 79-80; also, R. 83-84.] The Court of Appeals reversed the portions of the judgment awarding interest. (See Appendix A.)

It is important to note that in the judgment and supplemental decree of the District Court awarding attorneys fees and expenses of suit to the petitioners said Court provided:

> "The Court hereby retains its jurisdiction over this action and the parties thereto and the subject matter thereof, in order to act upon and determine the time, or times, when and the manner in which, and the method, or methods, whereby said allotted lands shall be sold and the payment of the compensation and expenses of suit hereby awarded to said petitioners shall be made to them, and in order to require and compel the enforcement, satisfaction and discharge of the equitable lien herein and hereby awarded to the petitioners, and in order to make and confirm a sale of said lands of the plaintiff, and to make distribution of the proceeds of said sale to the parties thereto as hereinabove provided, and in order to fully enforce the judgment and supplemental decree herein in accordance with the equitable jurisdiction, practice and procedure of this court." [R. 7-8.]

Similar reservations or retentions of jurisdiction over the parties and subject matter of this action were made in subsequent orders of the District Court relating to

sales of the Arenas lands and to the distribution of the proceeds thereof. [See Order of Sale etc., R. 14; Order for Readvertisement, R. 24; Judgment for distribution of funds in registry of District Court, R. 77-78.] In addition, other orders of the court expressly retained the equitable lien awarded petitioners on lands or proceeds of sale thereof. [See Order, R. 31; Stipulation and Order, R. 35; Order R. 37-38; Stipulation and Order, R. 40-41; Order, R. 43; Conclusions of Law, R. 72.]

Reasons for Granting the Writ.

1. The decision of the court below in the instant case, holding that the District Court was without jurisdiction to award interest on a judgment in a case in which the United States is a party but is not liable for the claim against Lee Arenas, is directly in conflict with decisions of this Court holding that when a suit is against the United States but no debt or claim is asserted against it, but is asserted against other parties to the suit, the rule of sovereign immunity from liability for interest does not apply.

Miller v. Robertson, 266 U. S. 243, 256-258;

Banco Mexicano v. Deutsche Bank, 263 U. S. 591, 603.

Cf.

National Home v. Parrish, 229 U. S. 494;

Standard Oil Co. v. United States, 267 U. S. 76, 79;

United States v. North American Transportation etc. Co., 253 U. S. 330, 336;

United States v. Creek Nation, 295 U. S. 103, 113;

Seaboard etc. Ry. Co. v. United States, 261 U. S. 299.

2. The decision of the court below is in direct conflict with the decisions of this Court, holding that in equity interest may be allowed on a claim as a means of compensating a creditor for loss of the use of his money.

Miller v. Robertson, 266 U. S. 243, *supra;*

Wicker v. Hoppock, 6 Wall. 94, 99, 18 L. Ed. 752;

Young v. Godbe, 82 U. S. 562, 21 L. Ed. 250;

Curtis v. Innerarity, 6 How. 146, 12 L. Ed. 380;

Spalding v. Mason, 161 U. S. 375, 396.

Also,

United States v. United Drill etc. Corp., 183 F. 2d 998;

Abell v. Anderson, 148 F. 2d 372, 375;

Seaboard Surety Co. v. Spear, 119 F. 2d 849, 852.

The jurisdiction conferred upon the district courts by 25 U. S. C. A., Sec. 345 is equitable.

See:

Arenas v. Preston, 181 F. 2d 62, cert. den. 340 U. S. 819.

Cf.

United States v. Equitable Trust Co., 283 U. S. 738.

3. The decision of the court below is in direct conflict with the rule that "when necessary in order to arrive at fair compensation, the Court in the exercise of a sound discretion may include interest or its equivalent as an element of damages." (*Miller v. Robertson*, 266 U. S. 243, 258.)

Also,

Concordia Ins. Co. v. School Dist., 282 U. S. 545, 554-555;

Standard Oil Co. v. United States, 267 U. S. 76, 79;

De La Rama v. De La Rama, 241 U. S. 154, 159-160;

The Paquette Habana, 189 U. S. 453, 467;

Eddy v. LaFayette, 163 U. S. 456, 467.

The District Court, in the exercise of its sound discretion, allowed interest on the judgment. The Court of Appeals erred in reversing the District Court's order allowing interest.

4. The decision of the court below is in conflict with the rule in equity that interest is given in response to considerations of fairness and is denied when its exaction would be inequitable.

Board of Comrs. v. United States, 308 U. S. 343, 352;

Billings v. United States, 232 U. S. 261;

United States v. Sanborn, 135 U. S. 271.

In the case at bar judgment awarding attorneys' fees and expenses of suit to petitioners was entered on April 6, 1951 [R. 3-8], and Arenas was given six months in which to pay the judgment. Both he and the United States appealed, and the judgment was affirmed. (*United States v. Preston*, 202 F. 2d 740.) The principal amount of said judgment was not paid until after order of distribution entered August 23, 1954. It would be grossly inequitable not to allow interest for the delay period of more than three years. The amount of the interest

for said period was ordered retained and is now in the registry of the District Court, and may be paid to petitioners without prejudice to the rights of third persons.

5. The decision of the court below, reversing the order of the District Court allowing interest on the judgment for attorneys' fees and expenses of suit, is contrary to the rule that where a court of equity has jurisdiction of the principal case it will completely dispose of its incidents and put an end to further litigation.

Pease v. Rathbun-Jones Engineering Co., 243 U. S 273;

Brame v. Keystone Credit Corp., 76 F. 2d 328, cert. den. 296 U. S. 591;

Taylor v. Spurway, 72 F. 2d 97;

Greer Inv. Co. v. Booth, 62 F. 2d 321.

Moreover, the decision of the court below is in conflict with its prior decision in this case (*Arenas v. Preston*, 181 F. 2d 62), where the court said, *Id.* pp. 65, 66;

> "We come to the question: Does the equity jurisdiction of federal courts under the Act of 1894 (*i.e.*, 25 U. S. C. A. sec. 345) invoke all equitable processes and hence permit the application of rules '* * * which experience has shown to be essential to the adequate protection of a wronged *cestui que trust* * * *?' United States v. Equitable Trust Co., 1931, 283 U. S. 738 * * *
>
> "Appellant United States in the instant case makes practically the same argument as it made in the Equitable case. That is, that the court cannot apply the general rule, to wit: That a court of equity may settle incidental questions as well as fundamental questions, because the applicable statutes in this case do not specifically authorize it" * * * (*Id.* p. 66.)

> "It seems to us that Congress could not have intended to commit the subject to its courts with any paralyzing limitation but, in committing the subject to its courts it intended them to fully exercise their general equitable jurisdiction." (*Id.* pp. 66-67.)

The decision below, if allowed to stand, would certainly place the "paralyzing limitation" mentioned, *supra*, upon the exercise of their general equity jurisdiction by the federal district courts, since it would tend to split such general equity jurisdiction into parts less than the whole and thereby prevent application of the rules that "equity delights to do justice, and that not by halves" and that "when equity once acquires jurisdiction it will retain it so as to afford complete relief." (21 C. J. 198.)

See, also:

80 C. J. S. 506, and cases cited in notes 39, 40;
Camp v. Boyd, 229 U. S. 530;
Shaffer v. Carter, 252 U. S. 37;
Roadway Express v. Murray, 60 F. 2d 293.

The District Court in the exercise of its general equity jurisdiction awarded "complete relief" to petitioners by its judgment allowing interest. The Court of Appeals, by disallowing interest, has thereby denied complete relief to petitioners.

6. The decision of the court below is contrary to the rule that, in order to redeem his lands from the equitable lien awarded to petitioners to secure payment of the judgment for attorneys' fees and expenses of suit, Lee Arenas was required to pay the judgment and also damages for delay.

Cal. Civ. Code, Secs. 2905, 2912;
16 Cal. Jur. 324, 347;

San Pedro Lbr. Co. v. Reynolds, 121 Cal. 74;
Loughborough v. McNevin, 74 Cal. 250.

The partial payment of the judgment, secured by the equitable lien, was insufficient to extinguish the lien.

Cal. Civ. Code, Sec. 2912;
Van Dorn v. Couch, 21 Cal. App. 2d 749.

The statutes are controlling. Section 2905 of the California Civil Code, *supra*, provides:

> "Redemption from a lien is made by performing, or offering to perform, the act for the performance of which it is security, and paying, or offering to pay, the damages, if any, to which the holder of the lien is entitled for delay."

Section 2912 of the California Civil Code provides:

> "The partial performance of an act secured by a lien does not extinguish the lien upon any part of the property subject thereto, even if it is divisible."

The money proceeds of the sales of portions of the lands of Lee Arenas were, by stipulation of all parties to the litigation including the United States, paid into the registry of the District Court. The lien of the judgment on the lands thus sold was transferred to said deposited funds, and the lands sold were released from said lien. This amounted to a redemption of the lands of Arenas from the lien of said judgment for fees and expenses with interest, and petitioners were authorized and required thereby to look to the funds deposited in the registry of the court for the satisfaction of the judgment. The lien was not and could not be discharged as to said funds until the principal amount of the judgment and damages for delay were fully paid.

Cal. Civ. Code, Secs. 2905, 1504;

16 Cal. Jur. 347 *et seq.;*

Golden State etc. Co. v. Ward Motor Co., 185 Cal. 402;

Leet v. Alexander, 143 Cal. 663;

Nelson v. Younger, 73 Cal. 704.

7. The decision of the court below is contrary to the rule that where no appeal is taken from a final order or judgment, such order or judgment is *res judicata.* The order allowing interest on the judgment for fees was entered on November 10, 1953, was not appealed from and was final, and the United States and Lee Arenas are estopped to question the validity thereof.

Partmar Corp. v. Paramount Pictures, 347 U. S. 89, 98;

United States v. Munsingwear, Inc., 340 U. S. 36;

C.I.R. v. Sunnen, 333 U. S. 591;

Southern Pacific Co. v. United States, 168 U. S. 1.

The rule of *res judicata* is particularly applicable to the order allowing interest in question. After the order was first made and entered on August 7, 1953 [R. 8-14], the United States moved to modify the same "by deleting therefrom the language: 'together with lawful interest at the rate of 7% per annum from April 6, 1951.'" [R. 15.] The District Court denied the motion but modified its original order to provide that interest run from October 6, 1951, instead of from April 6, 1951. [R. 18-19.] No appeal was ever taken from those orders, or either of them. *Res judicata* therefore applies.

8. The decision of the court below is not only in conflict with its former decision (*Arenas v. Preston,* 181

F. 2d 62), but it restricts and takes away to a large degree the equity powers of the District Court.

In its former decision (*Arenas v. Preston*, 181 F. 2d 62) the Court of Appeals expressly held that the District Courts had the power "to fully exercise their general equitable jurisdiction" in cases that come within the jurisdictional Act of 1894 (25 U. S. C. A., Sec. 345), including the settlement of "incidental questions as well as fundamental questions" even though the "applicable statutes in this case do not specifically authorize it." (*Id.* pp. 66-67.) The Court held that "incidental questions" included the allowance of attorneys' fees and the award of an equitable lien to secure payment thereof, and the Court expressly retained its jurisdiction "in order to fully effectuate and enforce the supplemental decree (for fees, etc.) herein in accordance with the equitable jurisdiction, practice and procedure of this court." [R. 3-8.] The equity jurisdiction conferred by 25 U. S. C. A., Sec. 345 was not exhausted, surrendered, or diminished by any order, judgment, or decree, entered in the case, but was expressly retained so that the Court might "require and compel the enforcement, satisfaction and discharge of the equitable lien herein and hereby awarded * * * and in order to fully effectuate and enforce the judgment and supplemental decree * * *." (*Id.*) We think the equity jurisdiction of the District Court included the incidental question of interest on the judgment, as well as the other incidents of the litigation.

It may also be noted in this connection that the decision of the court below, denying interest on the judgment for fees, is not in the best interest of Indians who are compelled to sue the United States in order to secure or to preserve their allotments in severalty, nor in the

best interests of their attorneys. In order to secure or preserve his right to an allotment an Indian must employ private counsel since "the Indian by himself was incapable of taking advantage of the privilege" of suing under 25 U. S. C. A., Sec. 345, and "attorney fees and other expenses would be the unavoidable concomitant." (*Arenas v. Preston*, 181 F. 2d 62, 66.)

It is doubtful whether any lawyer would have accepted employment in the Lee Arenas case if he could have foreseen the obstructing and delaying tactics of the Government in the case. The litigation began in 1940. Final judgment for Arenas was entered on May 14, 1945, but appeals and petitions for certiorari to this Court delayed enforcement of the judgment until after June 9, 1947, when this Court denied certiorari. Petitioners filed their petition for fees on October 24, 1947, but delays caused by the Government's appeals and other like tactics postponed final judicial action on the fee question until March 16, 1953. Further delays were requested by Arenas, so that he might sell portions of his land without loss or sacrifice, and these delays were granted by petitioners. [R. 20-44.] The Government joined in Arenas' requests. It was not until August 23, 1954, that the District Court entered its order to disburse to petitioners the amount awarded for fees and expenses, and the Government again appealed as to the interest allowed on the judgment. Fourteen years of litigation without one dollar of compensation or reimbursement of expenses, and more than three years of delay after their right thereto has been adjudged, should be sufficient basis in equity, if any is needed, for an award of interest on the judgment. The District Court in the exercise of its sound discretion in equity allowed interest, and its award should not have been reversed.

This Court has held in many cases where the United States was a party that the trial court "in the exercise of a sound discretion may include interest or its equivalent as an element of damages." (*Miller v. Robertson,* 266 U. S. 243, 258.) See other cases cited under Reason 3 for granting the writ, *supra.* In *Royal Indemnity Co. v. United States,* 313 U. S. 289, 296, this Court said:

> "In the absence of an applicable federal statute it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for nonpayment of the amount found to be due. (Citing cases.) * * *"

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court to the United States Court of Appeals for the Ninth Circuit, to the end that the judgment of said United States Court of Appeals herein complained of may be reviewed by this Honorable Court.

JOHN W. PRESTON,
OLIVER O. CLARK,
DAVID D. SALLEE,
Petitioners,

By JOHN W. PRESTON,
Counsel for Petitioners.

APPENDIX A.

Opinion of the United States Court of Appeals.

United States of America and Lee Arenas, Appellants, v. John W. Preston, Oliver O. Clark, and David D. Sallee, Appellees.

Lee Arenas, Appellant, v. John W. Preston, Oliver O. Clark, and David D. Sallee, Appellees. No. 14555.

United States Court of Appeals, Ninth Circuit. Feb. 23, 1956.

Rehearing Denied May 21, 1956.

Action by Indian to have determined his right to allotment of certain land situated in reservation. After the allotment had been made, the District Court, William C. Mathes, J., entered order directing distribution of interest on sum fixed as attorney's fees to Indian's attorney from fund in court representing proceeds of land sold under stipulation of parties. The Indian and the United States appealed. The Court of Appeals, Stephens, Circuit Judge, held that interest on such attorney's fees could not be imposed against sum representing restricted Indian land, but that trial court had not committed abuse of discretion in allowing attorney lien on proceeds of land recovered through his efforts for expenses incurred by him in prior suit which was in reality part of allocation proceeding.

Reversed in part, affirmed in part.

Perry W. Morton, Asst. Atty. Gen., John F. Cotter, Edmund B. Clark, Roger P. Marquis and John C. Harrington, Attys., Dept. of Justice, Washington, D. C., Laughlin E. Waters, U. S. Atty., Los Angeles, Cal., for appellant United States.

Irl Davis Brett, Los Angeles, Cal., for appellant Lee Arenas.

John W. Preston, Los Angeles, Cal., Oliver O. Clark, La Canada, Cal., David D. Sallee, Santa Monica, Cal., for appellees.

Before Stephens and Chambers, Circuit Judges, and Taylor, District Judge.

Stephens, Circuit Judge.

The United States in its appeal accurately states the two ultimate issues in the following language:

"1. Whether interest on attorney's fees may be imposed against a fund in court which represents restricted Indian land.

"2. Whether an attorney's lien on the proceeds of land recovered through his efforts in one suit includes expenses incurred in another suit."

In addition to the issues mentioned, there is a question as to the effectiveness of the appeal.

In Arenas v. Preston, 9 Cir., 1950, 181 F. 2d 62, this court, upon appeal, approved the impressment of a lien on the Indian's allotment of land for the attorney fees and cash advanced for costs by attorneys for the Indian. However, we remanded the case to the district court with instruction to ascertain and fix the reasonable sum for attorney fees instead of fixing the fees upon a contract which had been entered into between Lee Arenas and the attorneys. The district court complied with the conditions of the remand in a judgment and supplemental decree entered April 6, 1951. The district court's decree was silent as to the interest on the sums so fixed. The decree did, however, provide:

"Fourth. That the plaintiff Lee Arenas, be and he is hereby allowed a period of six (6) months from and after the date of the entry of the judgment and supplemental decree herein within which to pay the compensation and expenses of suit awarded to the petitioners, * * *."

It then provided in the next paragraph for the public sale of the lands and for the payment out of the proceeds of the sums referred to, together with expenses, and payment of the balance to the United States in trust for the plaintiff.[1] In the next paragraph of the decree the court provided for its own retention of jurisdiction to confirm any sale of the lands, distribute funds received from the sale, and generally—

"* * * in order to fully effectuate and enforce the judgment and supplemental decree herein in accordance with the equitable jurisdiction, practice and procedure of this [district] court."

No payment was made upon the judgment within the six-month period, but many months thereafter the attorneys filed a petition with the district court requesting a sale of the property under the judgment which petition was granted and the order provided that a commissioner should sell sufficient lands to pay expenses of the sale, the attorney fees and costs, and for the first time in the litigation, the interest thereon was mentioned as follows:

"* * * together with the lawful interest thereon at the rate of 7% per annum from April 6, 1951, [the

[1]We said in the cited case, Arenas v. Preston, 9 Cir., 1950, 181 F. 2d 62, at page 67: "The interest of the United States in the allotment will not cease to exist until the 'trust patent' to the property is ripened into an unqualified patent to it and the impressment of a lien for an excessive fee would illegally and inequitably affect such interest."

date of entry of the supplemental decree] * * *." The sale was to be made not earlier than October 24, 1953. This order of sale or judgment was made August 6, 1953, and entered August 10, 1953.

Thereafter, the United States made a motion to the district court to delete from the order of sale or judgment, the inclusion of interest on the unpaid sums, upon the ground that:

"* * * the judgment herein as entered [the April 6, 1951, judgment] does not require the payment of interest, and interest is not recoverable herein in any event."

The court denied the motion as made, but ordered the supplemental decree to be modified so as to require interest to run from October 6, 1951, the end of the six-month period in which the fees were payable, without resort to sale of the land. The last referred to order (modifying the order of sale) was made October 26, 1953, and entered November 10, 1953. No appeal was ever taken from this order.

Subsequently, and before public sale of the property, private sale of certain portions of the property was made, and by stipulation and court order the cash proceeds were deposited in the registry of the court, subject to the same lien as was impressed on the land.

Appellee Preston petitioned the district court for an order of payment, out of the money in the court's registry, of the interest and costs involved (together with advances made in another action which will be later clarified) and, after the issuance of a show-cause order, a hearing, and the findings of fact and conclusions of law, the court approved by its judgment dated August 21,

1954, and entered August 23, 1954. It is from this latter judgment that the instant appeal by the United States and Lee Arenas is taken as to the items of interest and the advances in the other action.

It is the contention of the appellee that the basis of the ruling, on the inclusion of the interest and costs in the judgment, is the order of sale made October 26, 1953, and entered November 10, 1953, from which no appeal was ever taken, and that the inclusion of interest and costs became *res judicata* thereby.

To this contention little defense is made but appellant United States says in its brief (and Arenas advances the same idea):

"Since the suit involved restricted Indian land it was a suit against the United States and the court's power was limited to the extent of the consent of Congress. Congress had not permitted the imposition of interest. Therefore the order or judgment attempting to charge interest against the fund was more than erroneous—it was void. United States v. United States Fidelity [& Guaranty] Co., 1940, 309 U. S. 506, 514 [60 S. Ct. 653, 84 L. Ed. 894]; United States v. New York [Importing] Rayon Co., 1947 329 U. S. 654, 658-663 [67 S. Ct. 601, 91 L. Ed. 577]; United States v. Shaw, 1940, 309 U. S. 495 [60 S. Ct. 659, 84 L. Ed. 888]; Tillson v. United States, 1879, 100 U. S. 43 [25 L. Ed. 543]; Carr v. United States, 1878, 98 U. S. 433 [25 L. Ed. 209]. Consequently, whether or not appealed from, the order of November 10, 1953, was without effect."

Unquestionably, the suit is, in nature, against the United States. In the case of United States v. New York Rayon Importing Co., 1947, 329 U. S. 654, 658, 67 S. Ct.

601, 603, 91 L. Ed. 577, the United States Supreme Court (after referring to §177(a) of the Judicial Code wherein the awarding of interest is specifically proscribed in suits before the Court of Claims unless upon a contract expressly stipulating for the payment of interest) says:

"* * * [T]his provision codifies the traditional rule regarding the immunity of the United States from liability from interest on unpaid accounts or claims. In other words, in the absence of constitutional requirements, interest can be recovered against the United States only if express consent to such a recovery has been given by Congress. * * * The consent necessary to waive the traditional immunity must be express, and it must be strictly construed. Tillson v. United States, 100 U. S. 43, 25 L. Ed. 543; United States v. Thayer-West Point Hotel Co., *supra* [329 U. S. 585, 67 S. Ct. 398, 91 L. Ed. 521]."

The principle is applied in Anglin & Stevenson v. United States, 10 Cir., 1947, 160 F. 2d 670, a case strikingly similar to the instant case. See Huntley v. Southern Oregon Sales, 9 Cir., 1939, 104 F. 2d 153.

And it was said in United States v. United States Fidelity & Guaranty Co., 1940, 309 U. S. 506, 514, 60 S. Ct. 653, 657, 84 L. Ed. 894:

"Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review [as in our case by not appealing from the order of November 10, 1953] cannot give force to this exercise of judicial power."

Appellee, however, argues that the sale of certain of the lands and the payment of the proceeds into the court's registry worked a redemption of the lands from the lien.

But the sale and the payment into court occurred under agreement of all parties with and under the stipulation that the money would be under the same restrictions as the land.

If, as it seems to us we must do, we hold that the failure to appeal from the November 10, 1953, order modifying the "Order for Sale of Real Property to Satisfy Supplemental Judgment and Decree" which was in essence a modifying order of the supplemental judgment, it leaves the matter of interest on the allowed attorney fees beyond attack as *res judicata* if the court had jurisdiction to allow the interest. If the court was without jurisdiction, its action was void as to the allowed interest, and we have just held it to be; therefore, the order was of no effect and it did not and could not be held as *res judicata* upon the item of interest.

It follows, therefore, that when in compliance with appellee's petition for distribution of the accumulated interest, the court ordered interest paid out of the trust fund in the court's registry, nothing stood in the way of an appeal by the United States and Arenas upon the ground that the order was void.

We hold that the appeal from the order directing the distribution of interest upon the sum fixed as attorney fees was proper and that the order in that particular was and is void.

In the long litigation concerning the right and extent of the right to allotment of lands to Lee Arenas, an action was brought by him in which Eleuteria Brown Arenas and the United States were defendants. Eleuteria was an adopted daughter, under tribal custom, of Lee and Guadaloupe Arenas, Lee's wife. In the prosecution of this suit, appellee Preston at the request of Lee Arenas

advanced the sum of $468.19 as expenses in the suit and the court ordered this sum paid to appellee Preston out of the funds on deposit in the court's registry. There can be no question as to the right of appeal on this item, since it is not mentioned in the original judgment or in the supplemental judgment or in the amendment to the supplemental judgment, and it appears for the first time in the court's order entered August 23, 1954, and the appeals of the United States and Arenas were timely.

The record shows no detail as to why the advanced monies in the Eleuteria case were ordered distributed out of the trust funds in the court's registry. The briefs of the parties are but sketchy and do not agree with each other. If the Eleuteria case was as appellee's brief states it, that it was:

"* * * in reality, a part of the allotment proceeding and was integrated therewith,"

and we note that the trial judge so regarded it, and that the expenditure was a necessary and proper one,

"to make fully effective the judgment awarding the allotment of Guadaloupe Arenas to Lee Arenas * * *,"

as appellee claims it to be, we think the court was within its equitable powers in ordering it paid out of the trust funds. All intendments are presumed in favor a judgment upon subject matter within the jurisdiction of the trial court. There is nothing before us upon which we can hold that the court committed clear error as to this item or that the order in this particular is void.

The court's order appealed from is reversed and set aside as to interest on the attorney fees, and affirmed as to the payment of $468.19 from the court's registry for advances made in the Eleuteria Brown Arenas suit.

Reversed in part. Affirmed in part.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 314

JOHN W. PRESTON, OLIVER O. CLARK AND DAVID D. SALLEE, *Petitioners*

v.

UNITED STATES OF AMERICA AND LEE ARENAS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (Pet. App. 1-8) is reported at 232 F. 2d 77.

JURISDICTION

The judgment of the Court of Appeals, reversing in part the judgment of the District Court, was entered on February 23, 1956 (Pet. App. A., p. 1). A timely petition for rehearing was denied on May 21, 1956

(Pet. App. A., p. 1). The Petition for a writ of certiorari was filed on August 13, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In a suit under the Act of August 15, 1894, to determine an Indian's right to certain land allotments, the Indian claimant was successful. In supplemental proceedings the District Court assumed jurisdiction to make an award to the Indian's attorneys for their services and for advances in connection with the litigation, impressed a lien on the allotted lands to secure payment of the award, and ordered a portion of the allotment sold to satisfy the award. The proceeds of the sale were deposited in the registry of the court, subject to the same lien as was impressed on the land. The question presented is:

Whether the District Court had jurisdiction to allow interest on the attorneys' award from the fund which represents restricted Indian land.

STATUTE INVOLVED

The Act of August 15, 1894, 28 Stat. 286, 305, as amended by the Act of February 6, 1901, 31 Stat. 760, 25 U.S.C. 345, is as follows:[1]

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who

[1] The jurisdictional provisions of this Act were incorporated in the Judicial Code, sec. 24(24), 28 U.S.C. 41(24) (1940 ed.), which was identical in scope with the 1894 Act, as amended. *First Moon* v. *White Tail*, 270 U.S. 243, 245. They are now codified in 28 U.S.C. 1353.

claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, * * *.

STATEMENT

Invoking the 1894 Act (*supra*, pp. 2-3), Lee Arenas, a member of the Agua Caliente or Palm Springs Band of the Mission Indians, instituted proceedings in 1940 for the determination of his rights to trust patent allotments in the Palm Springs Indian Reservation at Palm Springs, California. After extended litigation, his rights to certain of the allotments were established.[2] Thereupon, his attorneys,

[2] The course of the litigation was briefly as follows: The Government's motion for summary judgment of dismissal was granted on March 6, 1942, and the dismissal was affirmed by the Court of

petitioners here, filed in the allotment proceeding a petition for a supplemental decree which would determine the amount of compensation for services rendered and the amount of costs and expenses paid by petitioners for which they had not been reimbursed by Arenas (R. 3). They sought a judgment against Arenas, a lien upon the lands to secure the amount of the judgment, and the sale of a portion of the allotted lands sufficient to satisfy the judgment. The United States challenged the jurisdiction of the court to enter any order which would in any way affect the restricted allotments, and urged that petitioners' relief be limited to a personal money judgment against Arenas.

The District Court rejected the Government's contentions and entered a judgment providing for recovery from Arenas of a sum equal to 22½% of the unascertained value of the allotted lands as fees for services rendered and an additional $258.67 as reimbursement for expenses incurred. A lien was impressed on the allotted lands to secure payment of the award. Upon appeal, the judgment was affirmed as

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Appeals in reliance upon the decision in *St. Marie* v. *United States*, 24 F. Supp. 237 (S.D. Cal.), affirmed, 108 F. 2d 876, certiorari denied because petition out of time, 311 U.S. 652. *Arenas* v. *United States*, 137 F. 2d 199 (C.A. 9). This Court reversed the judgment. *Arenas* v. *United States*, 322 U.S. 419. Upon trial, the District Court found Arenas to be entitled to four allotments claimed by him. *Arenas* v. *United States*, 60 F. Supp. 411 (S.D. Cal.) This judgment was affirmed by the Court of Appeals as to two allotments and reversed as to the other two. *United States* v. *Arenas*, 158 F. 2d 730 (C.A. 9). This Court, on June 9, 1947, denied petitions for writs of certiorari filed by both parties. *Arenas* v. *United States* and *United States* v. *Arenas*, 331 U.S. 842.

to the basic issue of the court's power to impress a lien upon the restricted Indian's allotment as security for the payment of the judgment and to sell the property to enforce such lien. The Court of Appeals recognized the Government's continuing interest in the allotted lands, but, relying upon *United States* v. *Equitable Trust Co.*, 283 U.S. 738, reasoned that by the 1894 Act Congress had impliedly consented to the exercise of all equitable processes which included the award of attorneys' fees and the sale of a portion of the property to satisfy the award. The Court of Appeals concluded, however, that the trial court had erred in failing to determine the dollar amount of the fees, and the judgment was reversed and the cause remanded for such a determination. *Arenas* v. *Preston*, 181 F. 2d 62 (C.A. 9), certiorari denied, 340 U.S. 819.

On remand, the District Court found that petitioners were entitled to $90,000 for their services to Arenas, and on April 6, 1951, entered a judgment in the total amount of $90,258.67 (R. 3-8). It was silent as to interest, but provided for the impressment of a lien and the sale of the allotted lands if petitioners were not fully compensated within six months. (R. 5-7). This judgment was affirmed in all respects on March 16, 1953 (R. 10). *United States* v. *Preston*, 202 F. 2d 740 (C.A. 9).

Thereafter, the judgment not having been paid, petitioners moved for an order for the sale of so much of the property as might be necessary to pay the judgment (R. 10). On August 10, 1953, a judgment was entered ordering that the property be sold within 30

days after October 24, 1953 (R. 8-14). This judgment provided that the award of $90,258.67 should bear interest at the rate of 7% per annum from April 6, 1951 (R. 12). The United States filed a motion for the deletion of the interest provision (R. 15), and on November 10, 1953, acting on the Government's motion, the District Court entered an order amending the judgment of August 10, 1953, to provide that the interest should run from October 6, 1951, rather than from April 6, 1951 (R. 18-19). No appeal was taken from either of these two orders.

The ordered sale of the allotted lands was several times postponed because of the pendency of negotiations by Arenas' private counsel for the private sale of several parcels of the allotments, and finally arrangements were completed for the private sale of three parcels at a total price of $123,845.00 (R. 25-44). On April 30, 1954, on stipulation by the parties, separate orders were entered with respect to each of the three parcels (R. 25-44). These orders provided that the lien of the judgment of April 6, 1951, be transferred from the lands to the net proceeds ($122,114.00) of the sale, which amount was deposited in the registry of the District Court, and also provided that the order of sale entered on August 10, 1953, should be "vacated and set aside and of no further force or effect" insofar as it affected the lands described in the order (R. 30-31, 37-38, 43). Still later, on July 8, 1954, another order was entered, also on stipulation, declaring that the order for sale should be deemed vacated (R. 44-45).

Thereupon, petitioner Preston filed a petition requesting the distribution from the fund on deposit of the moneys owing to the attorneys, including interest at the rate of 7% per annum from October 6, 1951 (R. 46-57). The United States again opposed the adding of interest (R. 57-61). However, on August 23, 1954, the District Court filed findings of fact and conclusions of law and a judgment upholding the claims of petitioners in all respects (R. 61-78). The interest which accrued from October 6, 1951, to July 26, 1954, was found to be $17,725.80 (R. 66). Pursuant to a stipulation, the principal amount due to the attorneys was ordered to be distributed immediately (R. 68-69, 75-76), but the amount of the accrued interest ($17,725.80) was ordered to be retained in the registry pending an appeal, with the further sum of $2,500.00 being retained to take care of interest on the interest in the event the appeal were unsuccessful (R. 76-77).

On appeal by the Government, petitioners contended *inter alia* that the order of sale entered on November 10, 1953 (modifying the order entered on August 10, 1953) was *res judicata* of the interest question (Pet. App. A., p. 5). The court below reversed the judgment insofar as it allowed interest, holding that, since restricted Indian lands were involved, the suit was in nature one against the United States, so that there was no jurisdiction to allow interest and consequently the claim of *res judicata* was without merit (Pet. App. A., pp. 5-7).

ARGUMENT

1. The decision of the court below denying the allowance of interest on a judgment from the proceeds of the sale of restricted Indian lands is plainly correct and does not involve any conflict with the decisions of this Court or of other Courts of Appeal. It is well settled that the United States has such an interest in restricted Indian lands and the proceeds of their sale that any suit involving those lands or proceeds is a suit against the United States. *Sunderland* v. *United States,* 266 U.S. 226, 234-235. *Minnesota* v. *United States,* 305 U.S. 382, 386-388; *United States* v. *Hellard,* 322 U.S. 363, 366-367. Consequently, it is only to the extent of the Government's consent that the fund in court may be subjected to adverse claims, and congressional consent to suit against the United States does not include consent to the imposition of interest unless the statute expressly so states. *United States* v. *Hotel Co.,* 329 U.S. 585; *United States* v. *N. Y. Rayon Co.,* 329 U.S. 654, 658-659; *United States* v. *Goltra,* 312 U.S. 203, 210-211; *Boston Sand Co.* v. *United States,* 278 U.S. 41. In determining whether it has the power to impose interest the court may not consider the equities. *United States* v. *N. Y. Rayon Co.,* 329 U.S. 654, 659-660; cf. *United States* v. *Gilbertson,* 111 F. 2d 978, 980 (C.A. 7). Nor does the invalid entry of an unconcerted judgment against the United States give any rights to the plaintiff. Even the "failure of officials to seek review [of an order void for lack of jurisdiction] cannot give force to this exercise of judi-

cial power." *United States* v. *United States Fidelity Co.*, 309 U.S. 506, 514.[3]

It is true that the court below has previously held that the 1894 Act was a consent to subject the allotted lands to the payment of fees to the attorneys who prosecuted the Indian's claims. *Arenas* v. *Preston*, 181 F. 2d 62 (C.A. 9), certiorari denied, 340 U.S. 819. But it does not follow that the lands, now represented by the fund in the court's registry, may be subjected to the payment of interest. As was stated in *Anglin & Stevenson* v. *United States*, 160 F. 2d 670, 673 (C.A. 10), certiorari denied, 331 U.S. 834, a case which the court below found to be "strikingly similar" (Pet. App. A., p. 6) and which petitioners ignore:

> But, consent of the United States to be bound by a judgment does not amount to an express consent that such judgment shall bear interest. When the judgment was entered and became final, the equitable jurisdiction of the court was exhausted. The imposition of interest on the judgment was not a part of the equitable process to which the Government expressly consented to be bound.

See also *Ickes* v. *Ledbetter*, 135 F. 2d 658, 662 (C.A. D.C.). The opinion in the *Anglin & Stevenson* case

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[3] Thus, as the court below held (Pet. App. A., p. 7), the order entered on November 10, 1953, could not be *res judicata* upon the interest question. See Pet. 12. Moreover, that order (R. 18-19) could not possibly be *res judicata* upon any issue. Standing alone, it is plainly not a "final" order, but must be read along with the order of August 10, 1953 (R. 8-14), which it serves to amend. Inasmuch as the order of August 10, 1953, was vacated on stipulation (R. 30-31, 37-38, 43, 44-45), it would seem that the order of November 10, 1953, was likewise ineffective for any purpose.

(160 F. 2d at p. 673) also serves to distinguish the holding in *Miller* v. *Robertson,* 266 U.S. 243, upon which petitioners chiefly rely (Pet. 6, 7, 15). And *Standard Oil Co.* v. *United States,* 267 U.S. 76, the only other case upon which petitioners rely which is even remotely in point, is adequately explained in *United States* v. *Worley,* 281 U.S. 339, 342.

2. If there is error in the disposition by the Court of Appeals of these supplementary proceedings initiated by petitioners, it lies in the holding that by the 1894 Act Congress had impliedly consented to the award of attorneys' fees and the sale of a portion of the allotted lands to satisfy such award. *Arenas* v. *Preston,* 181 F. 2d 62 (C.A. 9), certiorari denied, 340 U.S. 819; *United States* v. *Preston,* 202 F. 2d 740 (C.A. 9). Such holding was made despite the absence of any explicit language to that effect in the 1894 Act and contrary to the principle that, just as in the case of any other special jurisdictional act waiving the sovereign immunity from suit, a jurisdictional act for the benefit of Indians "is to be strictly construed and may not by implication be extended to cases not plainly within its terms." *Klamath Indians* v. *United States,* 296 U.S. 244, 250; *Blackfeather* v. *United States,* 190 U.S. 368, 376. The ruling, in the absence of which the interest question would not arise, also runs counter to express statutory restrictions, including the provision that the trust patent allotments were not to be "liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor." Act of June 21, 1906, 34 Stat. 325, 327, 25 U.S.C. 354. See also Section 5 of the General Al-

lotment Act of February 8, 1887, 24 Stat. 388, 389, 25 U.S.C. 348; Section 5 of the Mission Indian Act of January 12, 1891, 26 Stat. 712, 713; Section 6 of the General Allotment Act as amended by the Act of May 8, 1906, 34 Stat. 182, 25 U.S.C. 349; Act of June 21, 1906, 34 Stat. 325, 327, 25 U.S.C. 410. Such restrictions on the disposition of Indian allotments are not to be lightly disregarded. *United States* v. *Rickert,* 188 U.S. 432; *Heckman* v. *United States,* 224 U.S. 413, 447; *Starr* v. *Long Jim,* 227 U.S. 613, 625; *Mullen* v. *Simmons,* 234 U.S. 192; *Drummond* v. *United States,* 324 U.S. 316.

The government has not sought review of this portion of the judgment below, but we refer to it here because, in our view, this even reveals another reason why petitioners' contention is meritless.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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